COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1987 **Cir. Ct. No. 2010SC15231**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

THOMAS VITRANO,

PLAINTIFF-APPELLANT,

V.

MILWAUKEE POLICE DEPARTMENT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JANE V. CARROLL, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Thomas Vitrano, *pro se*, appeals the dismissal of his small claims action against the Milwaukee Police Department for return of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

property taken during the execution of a search warrant. Because we conclude that Vitrano failed to name a suable defendant and failed to properly file a notice of his claim, we affirm.

BACKGROUND[2]

¶2 In August 2002, pursuant to the execution of a search warrant, the Milwaukee Police Department seized a crossbow, a BB gun and computer equipment that Vitrano claims belong to him. On April 5, 2010, in response to an inquiry by Vitrano, a Milwaukee County clerk informed Vitrano that the seized property had been destroyed several years earlier.

¶3 Seeking reimbursement for his destroyed property, Vitrano filed a small claims summons and complaint on May 17, 2010, naming the Milwaukee Police Department as the sole defendant. The Milwaukee Police Department filed a motion to dismiss the complaint arguing that: (1) in naming the Milwaukee Police Department as the only defendant, Vitrano had named a non-suable party; and (2) Vitrano had failed to make the requisite notice of claim pursuant to WIS. STAT. § 893.80(1)(a) & (b). The circuit court granted the Milwaukee Police Department's motion and dismissed Vitrano's claim.

[2] We note with some frustration that neither party included a single citation to the record in their respective briefs in violation of WIS. STAT. RULE 809.19(1)(d). Record cites are helpful to the court and are required even when the record is not voluminous. That the parties do not provide record cites is particularly troublesome to the court because both parties set forth numerous facts that are not located in the record, including mention of Vitrano's purported previous petition to obtain his confiscated property. Because the parties do not cite to the record and because this fact (and others) were not located in the record by the court, we do not consider the fact on appeal. *See* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) ("Assertions of fact that are not part of the record will not be considered.").

STANDARD OF REVIEW

¶4 A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint and presents a matter of law that we review independently of the circuit court. ***Wausau Tile Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). "The facts set forth in the complaint must be taken as true and the complaint dismissed only if it appears certain that no relief can be granted under any set of facts that the plaintiff[] might prove in support of [the] allegations." ***Northridge Co. v. W.R. Grace & Co.***, 162 Wis. 2d 918, 923, 471 N.W.2d 179 (1991).

¶5 Furthermore, both questions presented here—whether the Milwaukee Police Department can be sued as an entity separate from the City of Milwaukee and whether Vitrano complied with the notice-of-claim statute—are matters of statutory interpretation. We review questions of statutory interpretation independently of the circuit court. ***Szymczak v. Terrace at St. Francis***, 2006 WI App 3, ¶12, 289 Wis. 2d 110, 709 N.W.2d 103.

DISCUSSION

¶6 Vitrano raises two issues on appeal: (1) whether the Milwaukee Police Department can be sued as an entity separate from the City of Milwaukee; and (2) whether Vitrano complied with the notice-of-claim statute. We address each in turn.

¶7 First, the Milwaukee Police Department argues that it is not a suable entity separate from the City of Milwaukee, citing ***Grow v. City of Milwaukee***, 84 F. Supp. 2d 990, 995-96 (E.D. Wis. 2000), *reversed on other grounds by* ***Driebel***

v. City of Milwaukee, 298 F.3d 622 (7th Cir. 2002). Vitrano does not respond to this argument.

¶8 We conclude that the Milwaukee Police Department is correct that ***Grow*** held that the Milwaukee Police Department is not a suable entity separate from the City of Milwaukee. *See* ***id.***, 995-96. In reaching this conclusion, ***Grow*** relied on WIS. STAT. § 62.50, which does not authorize suit against the police department separately. More specifically, ***Grow*** held:

> WIS[CONSIN] STAT. § 62.50 governs police departments in cities of the first class, a category which includes the City of Milwaukee. Section 62.50 does not authorize police departments to sue or be sued. Further, by definition, the police department is an agency of the City of Milwaukee. As such, it is not a suable entity separate from the city. *See* ***Buchanan v. City of Kenosha***, 57 F. Supp. 2d 675, 678-79 (E.D. Wis. 1999) (Kenosha County District Attorney's Office not separate suable entity apart from Kenosha County itself); ***Abraham v. Piechowski***, 13 F. Supp. 2d 870, 879 (E.D. Wis. 1998) (sheriff's department part of county government not a separate suable entity).

Grow, 84 F. Supp. 2d at 995-96.

¶9 Here, Vitrano named only the Milwaukee Police Department as defendant, thereby not naming a suable defendant. Thus, on this basis alone we affirm the circuit court's dismissal.

¶10 Second, we also agree with the Milwaukee Police Department that Vitrano's small claims action was properly dismissed for his failure to comply with WIS. STAT. § 893.80(1)(a) & (b). Section 893.80(1)(a) prohibits any lawsuit against a governmental body unless a claimant files a written notice of the claim "[w]ithin 120 days after the happening of the event giving rise to the claim." Once a claim is filed, the complainant must wait until the claim is disallowed before filing any lawsuit. WIS. STAT. § 893.80(1)(b) (stating that disallowance occurs

either by providing the claimant with notice of disallowance or the passage of 120 days, whichever comes first).

¶11 The Milwaukee Police Department argues that Vitrano violated the notice-of-claim statute by: (1) not filing a claim within 120 days of his injury, which the Department argues occurred when the property was seized in 2002; and (2) by filing the lawsuit before filing the notice of claim.

¶12 Vitrano argues that the "event giving rise to the claim" was the April 5, 2010 letter from the clerk's office telling him that the police department had destroyed the property, but then admits that he did not file his notice of claim until after filing his complaint in this case.

¶13 There is no question here that Vitrano did not comply with the notice-of-claim statute. Even if we assume, without deciding, that "the event giving rise to the claim" was the clerk's April 5, 2010 letter, Vitrano still filed his lawsuit prior to disallowance of the claim. Vitrano filed his complaint and *then* filed his notice of claim. Filing the notice of claim after the suit does not save the action because WIS. STAT. § 893.80(1)(a) & (b) explicitly states that "no action may be brought" against a governmental agency until the notice of claim has been filed and the claim is disallowed. Vitrano failed to comply with the notice-of-claim statute and this forms the second basis for affirming the dismissal of his small claims action.

By the Court.—Order affirmed.

This opinion will not be published pursuant to WIS. STAT. RULE 809.23(1)(b)4.